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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78–657

ISABEL KIMBLE, BRUCE BLACKDAR, MARY FRAZZINI, THEODORE OLESON, JR., MARJORIE DA COSTA EASTMAN,

Appellants,

v.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, and LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervenor,

Appellees.

On Appeal From the Supreme Court of Nevada

MOTION OF APPELLEE WILLIAM D. SWACKHAMER TO DISMISS OR AFFIRM

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LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervenor,

Appellees.

On Appeal From The Supreme Court Of Nevada

MOTION OF APPELLEE WILLIAM D. SWACKHAMER TO DISMISS OR AFFIRM

Appellee William D. Swackhamer moves the Court to (1) dismiss the ap-

peal herein because of mootness or (2) dismiss the appeal or, in the alternative, affirm the judgment of the Supreme Court of Nevada on the grounds that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the Nevada Supreme Court which appears in the appendix hereto, p. 1a, infra, has appeared as a slip opinion, 94 Nev. Adv. Op. 169 (decided September 19, 1978).

The opinion of the First Judicial District Court of Nevada In And For Carson City, dated January 31, 1978, which appears in the appendix hereto, p. 10a, infra, is not reported.

QUESTION PRESENTED BY THIS APPEAL

Does Chapter 174, Nev. Stat. 1977 violate Article V of the United States Constitution by limiting, in any way, the power of the Nevada Legislature to either ratify or refuse to ratify a proposed amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES

Article V, Constitution of the United States:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several states shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its consent, shall be deprived of its equal Suffrage in the Senate.

Chapter 174, Nevada Statutes, 1977:

CHAPTER 174

AN ACT relating to a proposed amendment to the United States Constitution; providing an advisory referendum on ratification of the equal rights amendment; and providing other matters properly relating thereto.

[Approved April 12, 1977]

The People of the State of Nevada, represented in Senate and Assembly do enact as follows:

Section 1. At the general election on November 7, 1978, an advisory question shall be submitted to the registered voters of this state on the ratification of the proposed amendment to the Constitution of the United States known as the equal rights amendment.

Sec. 2. At the time and in the manner provided by law, the secretary of state shall transmit the question to the several county clerks, and the county clerks shall cause it to be published and posted as provided by law.

Sec. 3. The proclamation and notice to the voters given by the county clerks pursuant to law shall be in substantially the following form:

> Notice is hereby given that at the general election on November 7, 1978, an advisory question will appear on the ballot relating to the ratification of the following proposed amendment to the United States Constitution:
>
> 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> 3. This amendment shall take effect two years after the date of ratification.

> THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

Sec. 4. The ballot page assemblies and the paper ballots to be used in voting on the advisory question shall present the question in substantially the following form:

> Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?
>
> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Sec. 3. This amendment shall take effect two years after the date of ratification.
>
> Yes_____NO_____

Sec. 5. The explanation of the question which shall appear on each paper ballot and sample ballot and in every publication and posting of notice of the question shall be in substantially the following form:

(Explanation of the Advisory Question)

Nevada has not yet ratified the "Equal Rights Amendment" to the United States Constitution. A "Yes" vote on this advisory question would recommend that the Nevada legislature take action to ratify that amendment. A "No" vote on this advisory question would recommend that the Nevada legislature refrain from taking action to ratify that amendment.

THE RESULT OF THE VOTING ON THIS QUESTION DOES NOT PLACE ANY LEGAL REQUIREMENT ON THE LEGISLATURE OR ANY OF ITS MEMBERS.

Sec. 6. If a majority of the votes cast on the question is yes, the secretary of state shall certify the result to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state, that the proposed amendment to the Constitution of the United States be ratified by Nevada. If a majority of the votes cast on the question is no, the secretary of state shall certify the result as the recommendation of the registered voters of the state, that the legislature should not ratify the amendment.

Sec. 7. All general election laws not inconsistent with this act are applicable.

Sec. 8. The question required by this act shall not be placed on any ballot, nor shall any other action which is required by this act be taken,

if:

1. The Nevada legislature has ratified the proposed amendment on or before July 1, 1977; or

2. The legislatures of 38 other states have ratified the proposed amendment, and the United States Congress has accepted their ratification, on or before July 1, 1978.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

The appeal raises the question of whether Chapter 174, Nev. Stat. 1977 is repugnant to Article V of the United States Constitution. Chapter 174 is an act of the Nevada Legislature directing the Nevada Secretary of State and the various Nevada county clerks to place an advisory question upon the November 7, 1978 general election ballot. The format of the advisory question as it is to be published, printed on the ballot and explained to the voters is set forth in detail in the statute. After the tabulation of the vote, the results are to be transmitted by the Secretary of State to the President of the Nevada Senate and the Speaker of the Nevada Assembly.

The advisory question to be placed on the ballot concerns the proposed equal rights amendment to the United States Constitution and seeks the advice of the voters as to whether they recommend that the Nevada Legislature ratify the proposed amendment or not. The statute

clearly specifies, and directs that this be made known to the voters, that the result of the balloting does not place any legal requirement on the legislature or any of its members. The explanation of the question to be placed on paper ballots and sample ballots specifies that this is an advisory question, and it is so designated in Section 1 of this statute.

B. Facts And Proceedings Below

The Nevada Legislature, which meets biennially, convened its last session on January 17, 1977. As had been the case in the 1973 and 1975 Legislatures, when ratification was rejected both times, the proposed equal rights amendment was presented to the 1977 Nevada Legislature for ratification. The Senate, after a controversial and disputed tie-breaking vote by the Lieutenant Governor, ratified the measure on February 8, 1977, but the Assembly rejected the measure on February 11, 1977. Subsequently, Chapter 174, Nev. Stat. 1977 was enacted and approved on April 12, 1977. The legislature adjourned on May 9, 1977.

On November 8, 1977, appellants instituted an action in the Nevada state courts for a declaratory judgment that Chapter 174 was unconstituional and for an injunction to prevent the Secretary of State from acting to put the advisory question on the ballot. Jurisdictional Statement, p. 10. On January 31, 1978, the First Judicial District Court In And For Carson City found that Chapter 174 did not violate

Article V and entered judgment for the appellees herein and against appellants. An appeal was taken to the Nevada Supreme Court shortly thereafter and the Nevada Supreme Court affirmed the judgment of the lower court on September 19, 1978. On October 2, 1978, the appellants filed their notice of appeal with the Nevada Supreme Court. Finally, the appellants filed their Jurisdictional Statement with the United States Supreme Court on October 18, 1978.

ARGUMENT

I

The Appeal Should Be Dismissed Because It Is Moot

The provisions of Chapter 174, Nev. Stat. 1977 pertaining to the placement of the advisory question on the ballot in Nevada applies only to the November 7, 1978 election. The election has been held and the question, known as Question No. 5, did appear on the ballot. While the remaining provisions of Chapter 174 requiring the Secretary of State to transmit the results of the vote to the presiding officers of the legislature will not take place until the legislature meets on January 15, 1979 (the third Monday in January; see Nev. Const., art. 4, §2), this is a pure formality as far as notice of the election's results are concerned. The vote on Question No. 5 has been tabulated and the unofficial results, to be made official by the canvass of the Nevada Supreme Court on November 22, 1978 (the fourth Wednesday in November; see Nev.

Rev. Stat. § 293.395), have been widely published throughout the state. It may be assumed, therefore, that the legislators will be aware of the results of the vote on the question regardless of the final disposition of this appeal.[1]

The appellants are requesting a declaratory judgment that Chapter 174 is unconstitutional and for injunctive relief to prohibit its placement on the November 7, 1978 ballot. Their action is not a class action. However, as noted above, the November 7 election has been held and the advisory question was voted on and so the injunctive relief sought is moot since the event sought to be enjoined has occurred and cannot be undone. Richardson v. McChesney, 218 U.S. 487, 492 (1910); Cf. Brockington v. Rhodes, 396 U.S. 41, 43 (1969).

With respect to the declaratory relief requested, it should be noted that the only declaratory relief that could be given to appellants is that Chapter 174, which is applicable only to the November 7, 1978 ballot, is unconstitutional and should not be on the ballot on November 7. But Chapter 174, after transmission of the results of the vote on the advisory question to the legislature in January, 1979, will run its course and will forever cease to operate. The statute does not provide

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1 There were 61,748 votes in favor of advising ratification of the equal rights amendment and 123,691 votes opposed. (Unofficial results)

for other advisory votes on the equal rights amendment, even assuming the proposed amendment does not become ratified by the legislature in 1979. Since the event which the appellants sought to prevent by their declaratory judgment action has taken place with no foreseeable chance of occurring again, no real and substantial controversy exists any longer between parties having adverse interests. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

A live controversy must be extant at all stages of appellate review and not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 395, 401, (1975); Steffel v. Thompson, 415 U.S. 452, 459, n. 10 (1974). Mootness is a jurisdictional question, because the Supreme Court has held that it has no power to issue advisory opinions or abstract propositions. North Carolina v. Rice, 404 U.S. 244, 246 (1971). The Court has stated that its inability to review moot questions arises from the requirement of Article III of the United States Constitution that the exercise of federal judicial power depends on the existence of a case or controversy. Liner v. Jafco, Inc., 375 U.S. 301, 306, n. 3 (1964). Thus, a federal court cannot decide questions that can not affect the rights of litigants in the case before it. North Carolina v. Rice, supra at 246.

That is the situation before the court in the present case. The controversy between appellants and appellees is no

longer of sufficient reality to continue jurisdiction in this Court. The sole issue is whether Chapter 174, which can apply only to the Nevada general election of November 7, 1978, is constitutional. Appellant's interest in this question is whether the advisory question may permissibly be put on the November 7 ballot. The election occurred and so the request for declaratory relief is moot. The appellants no longer have an interest to protect.

It is possible that the equal rights amendment will not be ratified in the 1979 Nevada Legislature and it is possible that the legislature, anticipating re-introduction of the proposed amendment in the 1981 Nevada Legislature, may wish to enact another law to put the advisory question again on the ballot for 1980. However, this is pure speculation since it is not known whether the equal rights amendment will be ratified or not next legislative session, nor, assuming it is not, that the legislature believes another advisory question is desireable.

> "...[P]leadings must be more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." United States v. SCRAP, 412 U.S. 669, 688-689 (1973)

Issues based on speculation do not pre-

sent a justicable controversy nor afford grounds for reaching substantive decisions. Hall v. Beals, 396 U.S. 45, 49 (1969); Preiser v. Newkirk, supra at 403; Securities Exchange Commission v. Medical Committee, 404 U.S. 403, 406 (1972).

Nor does this case present an exception to the mootness doctrine by virtue of the fact situation being "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). Unlike Roe v. Wade, 410 U.S. 113, 125 (1973), the fact situation here does not present a matter that necessarily will always be resolved long before appellate review can be completed to its fullest extent. If the Nevada Legislature does find it necessary to enact another law providing for an advisory question on the equal rights amendment, potential plaintiffs will have over a year and a half from the legislature's usual adjournment in late April or early May of odd-numbered years and the next general election in even-numbered years. Indeed, if appellants in the present case had filed their action immediately after the April 12, 1977 approval of Chapter 174 instead of waiting seven months until November 8, 1977, the Supreme Court could have been able to have heard and decided the case before the election.

This is not a class action and thus there is no live controversy among any remaining class members. Franks v. Bowman Transportation Co., 424 U.S. 747, 752-757 (1976); DeFunis v. Odegaard, 416 U.S. 312, 317 (1974); Dunn v. Blumstein, 405 U.S. 330, 333, n.2 (1972). This is

not a case where the statute continues in existence thereby continuing to threaten the interests of other persons in a situation that is capable of repetition, yet evading review. Dunn v. Blumstein, supra; Moore v. Ogilvie, 394 U.S. 814, 816 (1969). Here, as stated above, Chapter 174 forever ceases to operate after the transmission of the vote on the advisory question to the legislature on January 15, 1979.

Thus, the governmental activity involved here does not constitue a "continuing and brooding presence" which creates a substantial adverse effect on the appellants or other persons claiming to be aggrieved by Chapter 174. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974). The possibility of the future enactment of a law similar to Chapter 174 does not present a problem capable of repetition, yet evading review since the enactment of such a law is removed two steps from reality--the necessity of non-ratification of the equal rights amendment in the 1979 Nevada Legislature and that legislature's discretion in deciding whether or not to enact a law similar to Chapter 174. Cf. Super Tire Engineering Co. v. McCorkle, supra at 123.

Chapter 174, Nev. Stats. 1977, being directed only at the November 7, 1978 general election in Nevada and such election having been held with the advisory question being voted on and the votes counted, neither declaratory nor injunctive relief is now warranted. The result which appellants sought to avoid by such declaratory or injunctive relief has come

to pass. There is no longer an immediate and real controversy. This matter is now moot and should be dismissed on that basis.

II

This Appeal Should Be Dismissed Or Affirmed Because The Question Raised By The Appeal Is Not Substantial

The advisory question, which was required by Chapter 174, Nev. Stat. 1977 to be placed on the November 7, 1978 ballot, is a non-binding vote of the people which would do no more than advise the Nevada Legislature of the opinions of the voters on the question of the ratification of a proposed equal rights amendment to the United States Constitution. Chapter 174 does not limit, control or direct the legislature to do anything with regard to the proposed amendment. The legislature and its individual members are perfectly free to act or not act on this matter regardless of the result of the election on the advisory question. These, in essence, are the terms of Chapter 174 and, necessarily therefore, constitute the holding of the Nevada Supreme Court. Appendix, p. 1a.

The appellants contend the statute is repugnant to Article V of the United States Constitution and thus raises a substantial federal question. However, this Court has very early held that the mere allegation of a federal question is not enough to confer jurisdiction in the Court. If the question raised is devoid of merit or has been foreclosed by decisions of the Court as to leave no room for a real controversy, a motion to dismiss an ap-

peal will prevail. Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902).

In this matter, the decisions of this Court which foreclose argument and leave no room for real controversy are Hawke v. Smith, 253 U.S. 221 (1920) and Leser v. Garnett, 258 U.S. 130 (1922).

In Hawke v. Smith the Supreme Court considered a case in which the Ohio Legislature had previously ratified a proposed amendment to the United States Constitution. Subsequently, following the authorization of the Ohio Constitution, there was an attempted binding referendum vote of the people on the Ohio Legislature's ratification action. The Supreme Court noted that the means for ratifying amendments to the United States Constitution rested exclusively with the legislatures of the states or state conventions, as determined by Congress. No provision was made in Article V for ratification by direct action of the people, as would be the case with a binding referendum which would have the effect of approving or rejecting the action of the legislature, thereby approving or rejecting the ratification of the amendment by the people. Such action could be taken only by the representatives of the people in legislatures or conventions. The referendum provisions of the Ohio Constitution in this regard were held to be in violation of Article V so far as applicable to the ratification of an amendment to the United States Constitution. [2]

Such a binding referendum on a prior

legislative ratification of a federal constitutional amendment would subvert the authority of the legislatures to ratify such amendments. "The view taken by the Court [in Hawke v. Smith] clearly makes it improper for a state constitution to impose limitations upon the exercise by the legislature of its power to ratify a federal constitutional amendment." (Emphasis added) Dodd, Amending the Constitution, 30 Yale L.Rev. 321, 344 (1921). The cases cited by the appellants in their Jurisdictional Statement, pp. 13-14, to support their contention that Chapter 174 violates Article V, Prior v. Noland, 68 Colo. 263, 188 P. 729 (1920); In re Opinion of the Justices, 188 Me. 544, 107 A. 673 (1919); Gill v. Morris, 79 Okla. 89, 191 P. 364 (1920); Hatch v. Murray, 165 Mont. 92, 526 P.2d 1369 (1974); Barlotti v. Lyons, 182 Cal. 575, 189 P. 282 (1920); Herbring v. Brown, 92 Ore. 176, 180 P. 328 (1919), all reach the same conclusion as Hawke v. Smith and upon identical facts. That is, each case dealt with the question of whether a binding referendum vote of the people could be held on a prior ratification of a federal constitutional amendment by a state legislature. Each concluded that

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2. The appellants are in error when they state in the Jurisdictional Statement, p. 13, that this case arose in Maine and affirmed sub. nom, In re Opinion of the Justices, 188 Me. 544, 107 A. 673 (1919). The case arose in Ohio and reversed Hawke v. Smith, 100 Ohio St. 385, 126 N.E. 400 (1919).

such a vote could not be held and for the same reasons noted in Hawke v. Smith.

Leser v. Garnett, supra considered a case in which state constitutions specifically provided that a legislature could not consider a proposed constitutional amendment unless a majority of its members were elected after the amendment was submitted to the legislature. Although this was not a limitation on how legislators were to vote, nor constituted a referendum on prior action by the legislature, it was a limitation on when a legislature could ratify an amendment to the United States Constitution. The legislative session then sitting when the amendment was submitted by Congress was specifically prohibited from acting. The law provided that only a future session of the legislature could act. The Supreme Court held such provisions invalid as contrary to the provisions of Article V, since Article V imposed no limitation upon which session of a state legislature could ratify an amendment or when it could do so. In this regard, the federal constitution "...transcends any limitations sought to be imposed by the people of a state." (Emphasis added) Leser v. Garnet, supra at 137.

Cases relying on Leser v. Garnett on the same question are Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972); Trombetta v. Florida, 353 F.Supp. 575 (M.D. Fla. 1973)

One final type of limitation on Article V that has been held unconstitutional was considered in State ex rel Tate v. Sevier, 333 Mo. 622, 62

S.W.2d 895 (1933), also cited by appellants. Jurisdictional Statement, p. 14. Here, Congress directed that states adopt a federal constitutional amendment by conventions. Missouri enacted a law to elect a convention, but opponents of the constitutional amendment acted to put the law to a binding referendum vote of the people. Relying on Hawke v. Smith and Leser v. Garnett, the Missouri court held this was an attempt to use a state law to place a limitation on the federal ratification process since, if the people voted against the law providing for a convention there would be no convention in Missouri and no means for the state to ratify or reject the amendment, despite the clear direction of Congress, pursuant to Article V, that a convention be called.

The clear holding of this Court in Hawke v. Smith and Leser v. Garnett is that whenever a state attempts to place a limitation on its legislature in ratifying or refusing to ratify a federal constitutional amendment, such a limitation interferes with the ratification process of Article V and so is unconstitutional. Such limitations may take the form of binding referendum votes of the people on prior legislative ratifications, which conceivably could have the effect of rejecting legislative ratifications, or such limitations could attempt to direct when a legislature may ratify an amendment. Chapter 174 fits neither category.

Chapter 174 requires a question to be put on the November 7, 1978 ballot. The question is expressly made advisory. It does not bind the legislature in any way. It does not modify or alter the process

of ratification since the legislature is free to act as it sees fit and when it sees fit, all in accordance with Article V. The question is not even a referendum since no previous action of the legislature has taken place to ratify the amendment. A referendum is "...the right of the people to have submitted for their approval any act or part thereof passed by the legislature." 82 C.J.S., Statutes, § 115.[3] The statute, therefore, is not contrary to the holding in Hawke v. Smith.

Appellants hint that the question, despite its advisory nature, is actually considered binding by the legislators and they attach three newspaper articles and a newsletter to their Jurisdictional Statement as "proof". Jurisdictional Statement, p. 16; appendix to Jurisdictional Statement, pp. 15a-26a.

First, however, the trial court found that Chapter 174 was not binding on the legis-

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3. Although the title to Chapter 174 mentions the words "advisory referendum", the body of the statute consistently calls the matter an "advisory question". In Nevada the title of a statute does not control its meaning unless necessary to clear up an ambiguity. Las Vegas Police Protective Association v. City of Las Vegas, 89 Nev. 394, 396, 513 P.2d 1231 (1973). Titles are loosely and carelessly inserted and are not a safe exposition of the law. 1 Kent, Commentarie 460 (14th ed. 1896).

lature and this was affirmed by the Nevada Supreme Court. Appendix, pp. 1a and 10a. In considering a federal question, this Court has held it is bound by a state court's construction of a state statute. Hortonville District v. Hortonville Education Assoc., 426 U.S. 482, 488 (1976); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959); Albertson v. Millard, 345 U.S. 242, 244 (1953); Guaranty Trust v. Blodgett, 287 U.S. 509, 512 (1933).

Second, neither the newspaper articles nor the newsletter constitute any kind of competent evidence. None were properly introduced as evidence into the trial court and none of the statements were given under oath either by the persons allegedly making them nor by the authors of the articles. They all constitute hearsay, and in only one are the statements contained therein even attributable to a legislator, and he is only one state legislator out of sixty in Nevada.

Appellants contend, however, that Chapter 174 is contrary to the holding of Leser v. Garnett, if not Hawke v. Smith, because the statute requires the legislature to defer action until after the vote is tabulated on the advisory question and after a majority of legislators are elected on November 7, 1978, thereby limiting when a legislative session could act on ratification. Jurisdictional Statement, pp. 17-18.

A mere reading of the statute will demonstrate the falsity of this argument. There is nothing in the statute which in any way requires the legislature to do

anything. Chapter 174 was approved on April 12, 1977 and the legislature adjourned May 9, 1977, not to meet again until its next biennial session on January 15, 1979. (Nev. Const. art. 4, § 2). There was nothing to prevent the legislature from again considering the proposed equal rights amendment during the last month of its 1977 session, nor would the legislature have been prevented from considering the amendment in special session had one been called between biennial sessions (Nev. Const., art. 5, § 9). Indeed, Section 8 of Chapter 174 actually contemplated the possibility that the legislature, in regular session, could have taken action on the amendment prior to July 1, 1977. The fact that these events did not occur was not at the direction of Chapter 174.

Obviously, since the legislature meets biennially with its next session beginning January 15, 1979, it stands to reason that the election to be held in the meantime on November 7, 1978 will result in a majority of the legislators being elected to the new legislature. (One half of the Senate and all of the Assembly were elected). Once again, this is not at the discretion of Chapter 174, unlike the state constitutional provisions found invalid in Leser v. Garnett, supra, Walker v. Dunn, supra and Trombetta v. Florida, supra. Chapter 174 does not require this situation and there was nothing prohibiting the legislature from meeting at any time between April 12, 1977 and November 7, 1978, to consider the equal rights amendment. As Justice Rehnquist stated in his opinion in this case rejecting appellants' request for an injunction, "That

the Nevada Legislature is unlikely to vote on the amendment before a referendum that it mandated is not a constitutionally cognizable grievance." (Justice Rehnquist's emphasis). Kimble v. Swackhamer, ____ U.S. _____, No. A-354 (78-657), slip op. p.2 (Rehnquist, Circuit Justice, October 20, 1978).

In summary, then, the decisions of this Court in Hawke v. Smith and Leser v. Garnett make it clear that whenever there is any attempt by a state to place a limitation on the right of a legislature to freely act upon a proposed federal constitutional amendment, whether, for example, by a binding referendum or by limiting when a legislature may so act, Article V of the United States Constitution is violated. It surely follows that when no such limitation is placed on the right of the legislature to so act, Article V is not violated. Chapter 174, Nev. Stat. 1977 places no such limitations on the right of the Nevada Legislature to act in either ratifying or refusing to ratify the proposed equal rights amendment. Chapter 174 places no restriction on when the legislature may act nor does it make the results of the vote on the advisory question binding on the legislature or its members.

The decisions of this Court in Hawke v. Smith, and Leser v. Garnett demonstrate that this appeal is devoid of merit and is so foreclosed by the aforesaid decisions as to leave no room for real controversy. The federal question thus presented by the appeal is not substantial.

Conclusion

For these reasons, appellee William D. Swackhamer respectfully requests this Court to (1) dismiss the appeal in this case for mootness or (2) dismiss the appeal or, in the alternative, affirm the judgment of the Nevada Supreme Court on the grounds the federal question presented is so unsubstantial as to need no further argument.

Dated this 10th day of November, 1978.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

ISABEL KIMBLE, BRUCE BLACKADAR, MARY FRAZZINI, THEODORE OLESON, Jr., and MARJORIE DA COSTA EASTMAN, Appellants, v. WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada; and LEGISLATIVE COMMISSION OF THE STATE OF NEVADA, Intervener, Respondents.

No. 10650

September 19, 1978

Appeal from judgment; First Judicial District Court, Carson City; Michael E. Fondi, Judge.

Affirmed.

Gunderson, J., dissented.

Phyllis Halsey Atkins, Reno, for Appellants.

Robert List, Attorney General, and Donald Klasic, Deputy Attorney General, Carson City, for Respondent Secretary of State.

Frank W. Daykin, Carson City, for Respondent Legislative Commission.

OPINION

By the Court, Thompson, J.:

At issue is the constitutionality of chapter 174, 1977 Nev. Stats., which requires the submission of an advisory question to the registered voters of this state on the ratification of the proposed amendment to the Constitution of the United States commonly known as the equal rights amendment. It is asserted that the chapter violates article V of the federal constitution. The district court found no constitutional infirmity. For reasons hereafter expressed we agree with that court, and, therefore, affirm the judgment entered below.

The advisory question to be presented at the 1978 general election is set out in section 4 of the chapter. It is:

> "Do you recommend that the Nevada legislature ratify the following proposed amendment to the United States Constitution, commonly known as the equal rights amendment?
>
> "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> "Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "Sec. 3. This amendment shall take effect two years after the date of ratification.
>
> "Yes..... NO....."

Section 3 and section 5 of the chapter

each expressly state that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." Section 6 directs the secretary of state to certify the result of the votes cast on the question to the president of the senate and the speaker of the assembly as the recommendation of the registered voters of the state. Thus, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote.

Article V of the federal constitution divests the people of authority to themselves ratify amendments to the federal constitution. Such power is limited to two methods, by action of the legislatures of three fourths of the states, or conventions in a like number of states. Hawke v. Smith, 253 U.S. 221 (1920) [1]

The appellants contend that chapter 174, in practical effect, grants the registered voters of Nevada the authority to ratify the proposed equal rights amendment to the federal constitution

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[1] Article. V.: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and

since we may presume that the legislature will be governed by the outcome of the advisory vote if, perchance, it recommends ratification. However, the cases upon which they mainly rely in presenting this contention are not supportive. Those cases are Hawke v. Smith, supra, and Leser v. Garnett, 258 U.S. 130 (1922).

Hawke held that there could be no referendum upon the decision of a state legislature to ratify or reject a proposed amendment to the federal constitution. And Leser merely held that the function of a state legislature in ratifying a proposed amendment to the federal constitution was a federal function transcending any limitations sought to be imposed by the people of the state.[2]

Chapter 174 does not concern a binding referendum, nor does it impose a limitation

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purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

upon the legislature. As already noted, the legislature may vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote. The recommendation of the voters is advisory only. In re Estate of Hogan, 146 N.W.2d 257 (Iowa 1966). To recommend does not mean to bind. Fletcher v. Porter, 21 Cal. Rptr. 452, 454 (Cal. D.C.A. 1962). Consequently we find it wholly impossible to construe chapter 174 as a limitation on legislative power violative of article V of the federal constitution.[3] Rather, the chapter simply specifies a means by which to assist the legislature whether to consent or not to consent to the proposed amendment. The following words of Dyer v. Blair,

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2 Other cases dealing with a binding referendum on prior legislative action ratifying a proposed amendment to the federal constitution are Barlotti v. Lyons, 189 P. 282 (Cal. 1920); In re Opinion of the Justices, 107 A. 673 (Me. 1919); Decher v. Vaughan, 177 N.W. 388 (Mich. 1920); Hatch v. Murray, 526 P.2d 1369 (Mont. 1974). In each instance, the court found a violation of article V of the federal constitution.

Limitations upon legislative power to ratify or refuse to ratify a proposed federal amendment likewise are in violation of article V. Trombetta v. State of Florida, 353 F.Supp. 575 (M.D. Fla. 1973); State ex rel. Tate v. Sevier, 62 S.W.2d 895 (Mo. 1933); Walker v. Dunn, 498 S.W.2d 102 (Tenn. 1972).

390 F.Supp. 1291, 1307 (N.D. Ill. 1975), are apposite to the case at land:

> "Article V identifies the body--either a legislature or a convention--which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself. This conclusion is not inconsistent with the premises that the definition of the term "ratified" is a matter of federal law. The term merely requires that the decision to consent or not to consent to a proposed amendment be made by each legislature, or by each convention, in accordance with procedures which each such body shall prescribe."

Affirmed.

BATJER, C.J., and MOWBRAY and MANOUKIAN, JJ., concur.

GUNDERSON, J., dissenting:

I respectfully dissent.

I question whether the federal issue

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3 One case, Opinion of the Justices, 160 N.W. 439 (Mass. 1928) may be read to support the proposition that a non-binding procedure is violative of article V. We reject that opinion as unsound and not supported by the authorities relied upon by the Massachusetts court.

could, in any event, be considered correctly decided. Moreover, so far as I can perceive, my colleagues have not explained how it is proper under the Nevada Constitution for our Legislature--through an "Act" obviously intended neither to make nor to modify law, and therefore manifestly outside the Legislature's normal lawmaking function--to utilize this state's election ballots in ways not contemplated by Nevada Constitution.

As the Legislative Counsel concedes, in Gibson v. Mason, 5 Nev. 283 (1869), this court declared the Legislature could not properly use the ballots to shift ultimate responsibility for enactment of a proposed law to the voters.[1] A fortiori, it would seem the Legislature, by Constitution solely a law-making body, may not pass a non-law requiring an "advisory" vote which binds neither the Legislature nor anyone else, and which defers to a future day decision on how the vote may be used to shift or dilute legislative responsibility.

In Opinion of the Justices Relative to Eighteenth Amendment, 160 N.E. 439 (Mass. 1928), the Supreme Judicial Court of Massachusetts treated a question identical in principle to the one before us, i.e. whether an attempt through initiative petition to order an advisory question onto the State election ballots was pro-

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1 "An act of the legislature made dependent upon their votes or approval would be utterly void--and so it has been frequently held." Id. at 293.

per under the Massachusetts Constitution. Deciding such a directive was an improper exercise of law-making power, the Massachusetts court noted its view that "[t]he precise question is whether it is a 'law'..." Holding in the negative that respected court noted that "the word 'law' imports a general rule of conduct," 160 N.E. at 440, which of course the "Act" of our Legislature, now under consideration, most certainly does not involve. The Court went on to note that the supposed law was

> ...wanting in features essential to constitute its provisions a law within any permissible conception of the meaning of that word. Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative. The mandate to the secretary of the commonwealth in section 2 to tabulate the returns of the votes and to "transmit copies *** to each Senator and Representative in Congress from this commonwealth" is subsidiary and incidential to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual.

160 N.E. at 440.

Ms. Atkins, counsel for the E.R.A. proponents, in effect contends this "advisory" referendum is not only unconstitutional on its face, but inherently unfair to historically disadvantaged and therefore relatively underfinanced persons, such as

the proponents in this case arguably are. Ms. Atkins notes that rather than being able to concentrate their efforts merely on persuading the Nevada Legislature, as the U.S. Constitution would contemplate, E.R.A. proponents will now be forced to expend important financial resources attempting to win a totally non-binding victory in the November election--under penalty of having defeat used against them during the later, binding struggle in the Legislature.

Moreover, as Ms. Atkins points out, the E.R.A. proponents may well incur disadvantages from the "advisory" referendum--even if statewide vote totals show overall approval of the E.R.A. Election returns will be available district by district. Hence, arguably some key legislators might be persuaded by the advisory note to oppose the E.R.A., even if Ms. Atkins' clients succeed in generating general support for the amendment throughout Nevada.

Thus, Ms. Atkins argues in effect, by the improper use of the Nevada election process, the cost of the ratification process contemplated by the U.S. Constitution will be increased, its complexion will be changed, and uncontemplated complexities will be imposed. I agree.

Case No. 38593 Department No. 2

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

ISABEL KIMBLE, et al., Plaintiffs,

vs.

WILLIAM D. SWACKHAMER, Secretary of State of the State of Nevada, Defendant.

LEGISLATIVE COMMISSION OF THE STATE OF NEVADA,
Intervener.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The parties to this action having filed cross motions for summary judgment, with the plaintiffs also filing a motion for preliminary injunction, and the parties having filed their points and authorities and an oral hearing being held thereon on January 30, 1978;

In consideration thereof, and for good cause appearing, this Court hereby makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On November 8, 1977, the plaintiffs filed their complaint for declaratory

judgment and preliminary injunction for the purpose of challenging the constitutionality of Chapter 174, Statutes of Nevada 1977.

2. The parties agree that plaintiffs are taxpayers and tax monies will be expended to implement Chapter 174.

3. On December 29, 1977, the defendant and intervener filed a joint motion for summary judgment and on January 13, 1978, the plaintiffs filed motions for summary judgment and preliminary injunction.

4. There are no material facts in dispute, and only issues of law remain to be decided.

CONCLUSIONS OF LAW

1. The plaintiffs, as taxpayers, have the standing to bring this action. Both sides present a justiciable controversy through their adverse interests, and the matter is ripe for adjudication. Therefore, an action for declaratory judgment is proper.

2. Chapter 174 is a "law" within the provisions of Article 4 of the Nevada Constitution. It meets all of the prerequisites of a law with respect to its drafting and approval by the Legislature and its endorsement by the Governor. As a law, it requires and directs certain acts to be performed by the election officers of the state for the purpose of placing an advisory question upon the ballot and to transmit the result of the vote to the Legislature.

3. Chapter 174 is not an initiative or referendum measure and, therefore, does not violate Article 19 of the Nevada Constitution.

4. The nonbinding nature of the advisory question does not make Chapter 174 invalid. All legislation, not expressly prohibited by either the state or federal constitution, may be enacted by the Legislature. Chapter 174 is within the legislative authority vested in the Legislature by Article 4, Section 1 of the Nevada Constitution, since there is nothing in the Nevada Constitution which prohibits the Legislature from placing a non-binding, advisory question on the ballot.

5. Since the vote on the advisory question provided for in Chapter 174 is non-binding and not controlling on the Legislature, and since the Legislature, therefore, is not required to follow the results of the vote on the question of whether the Equal Rights Amendment should be ratified or not, Chapter 174 is not a part of the ratification process established in Article V of the United States Constitution and thus does not violate said Article V.

6. Plaintiffs are not entitled to either their motion for summary judgment or preliminary injunction.

7. Defendant and intervener are entitled to their motion for summary judgment.

ORDER

Therefore, in consideration of the

foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed that:

1. Plaintiff's motions for summary judgment and preliminary injunction are denied; and

2. Defendant and intervener's motion for summary judgment is granted.

DATED this 31st day of January, 1978.

/s/ MICHAEL E. FONDI
Michael E. Fondi
District Judge